

After the Implosion: Trailing-Edge Guidelines for a New Era

Mark Osler*

I. INTRODUCTION

In the Fall of 1989, I sat at a worn wooden desk with gum stuck to the bottom, listening to Professor Daniel Freed talk about the federal sentencing guidelines. I was captivated. Here, it seemed, there was a system of sentencing which demanded fairness, regularized punishment, and created a normative value for various wrongs. Professor Freed and virtually every other person in the room were strongly opposed to the guidelines,¹ but I stood up for them, rebutting every criticism.

It was a belief in the federal guidelines and their seeming moral certainty that, in part, led me to later become a federal prosecutor in Detroit. There, I used the guidelines as a tool in cases against drug dealers, bank robbers, and counterfeiters. At every turn, I justified the guidelines as a product of democratic processes and a proper check on outlandish judicial discretion.

Then, something happened. I was preparing for the sentencing of yet another crack defendant, a 19-year-old first offender who was caught in an abandoned house with a little over five grams of rocks in little plastic bags. He also had a gun. His attorney was a federal defender named Andrew Densmo, a veteran of many similar cases. The judge was Anna Diggs Taylor, at that time the Chief Judge of the Eastern District of Michigan and a well-respected former prosecutor.

The case was called, and I made my appearance. When called upon, I stated a few simple, unavoidable facts—that the defendant faced a mandatory ten year sentence, five for the crack and five for the gun, and that the sentencing guidelines required at least that much time. I noted that the defendant had been convicted at trial, and returned to my seat, confident in my knowledge that there was nothing Andrew Densmo could say which would change the inevitable sentence.

Chief Judge Taylor looked down at Mr. Densmo. “Are you going to make the usual futile argument?” she asked sadly. He nodded, and walked to the podium. For the next twenty minutes, he launched a precise, thorough, and passionate attack on the provisions of the statute and the sentencing guidelines which required such a sentence. He pointed out that the bank robber whom Chief Judge Taylor had just sentenced had received much less time; that the crack

* Professor of Law, Baylor Law School. The author would like to thank Landon Ramsay for his help.

¹ See Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1683–84 (1992).

guidelines were wholly arbitrary, especially in comparison with the guidelines for powder cocaine offenses; that the price for this arbitrary standard fell almost entirely on black defendants; that the sentence was unlikely to change anything, since another 19-year-old would soon take this defendant's place; and that the required sentence would, while accomplishing nothing in terms of reducing crime, ensure that this defendant would probably commit more serious offenses later.

When he was done, Chief Judge Taylor sentenced the defendant to the required ten-year sentence. She obviously did not believe that what she was doing was justice, and regretted that Andrew Densmo's impassioned speech was futile.

Or was it? On that afternoon, my mind began to change. In the narrow area of crack sentencing, Densmo's arguments were troubling, even to my seemingly made-up mind. Soon I was avoiding taking more drug cases, and in a few years I left prosecution to become an academic. Once ensconced in a professorship, my ideas began a real transformation. At first, I politely nibbled around the edges, critiquing some aspects of the guidelines and suggesting limited reforms.² Later, I sought more thorough changes, such as changing the way we judge culpability in drug crimes.³ Finally, I reached the end of this evolution: in my past two articles, I have argued that the guidelines are fundamentally unprincipled⁴ and unstable,⁵ and must be scrapped in favor of something better.

In this essay, I will describe what that something better might be. To date, we have used "leading-edge" guidelines that tell judges what to do by leading them to what the Sentencing Commission thinks is a proper outcome. I suggest we switch to a system of "trailing-edge" guidelines which will instead be based on the sentences federal judges have actually given in similar cases.

In short, we should retain and use what the Sentencing Commission does well (collecting data and sharing it) and dump what the Commission does poorly: setting arbitrary guidelines largely pulled out of thin air or intuited from vague Congressional directives. I propose that there be advisory guidelines, but in a radically new form that abandons the idea that the commission must *lead* judges to specific periods of imprisonment through leading-edge guidelines which become normative. In this new model, the advisory guidelines should only serve to inform

² Avern Cohn & Mark W. Osler, *The Calculation of Criminal History by AUSAs and Defendants: A Study of Inefficiency in the Eastern District of Michigan*, 13 FED. SENT'G REP. 327 (2001); Mark Osler, *The Blakely Problem and The 3X Solution*, 16 FED. SENT'G REP. 344 (2004); Mark Osler, *Uniformity and Traditional Sentencing Goals in the Age of Feeney*, 16 FED. SENT'G REP. 253 (2004); Mark Osler, *Must Have Got Lost: Traditional Sentencing Goals, the False Trail of Uniformity and Process, and the Way Back Home*, 54 S.C. L. REV. 649 (2003).

³ Mark Osler, *More Than Numbers: A Proposal for Rational Drug Sentences*, 19 FED. SENT'G REP. 326 (2007); Mark Osler, *Indirect Harms and Proportionality: The Upside-Down World of Federal Sentencing*, 74 MISS. L.J. 1 (2004).

⁴ Mark Osler, *Policy, Uniformity, Discretion, and Congress's Sentencing Acid Trip*, 2009 BYU L. REV. 293.

⁵ Mark Osler, *Seeking Justice Below the Guidelines: Sentencing as an Expression of Natural Law*, 8 GEO. J. L. PUB. POL'Y 167 (2010).

judges of what the national sentencing trends are for a given type of case, based on the sentences given by federal district judges across the country. Such guidelines could take advantage of computer technology by graphically describing national practices for a specific type of case, allowing for adjustment as the sentencing judge adds variables. Instead of being told what to do by a bureaucracy, judges would be informed what other judges in a similar situation have done.

Part II of this essay will argue that our current leading-edge federal sentencing guidelines, even in advisory form, are both unstable and unprincipled. Part III will then describe the options for reacting to these problems. Finally, Part IV will describe the trailing-edge model in more detail and describe its advantages.

II. UNSTABLE AND UNPRINCIPLED GUIDELINES

A. *Unprincipled Guidelines*⁶

Congress has articulated no fewer than thirty-one distinct and important policy goals which are supposed to be reflected in the sentencing system under the guidelines.⁷ As one might expect, these directives point in so many different

⁶ This section reflects my argument in Osler, *supra* note 4.

⁷ Those policy goals require that sentences reflect consideration of each of the following:

- 1) The nature of the offense. 18 U.S.C. § 3553(a)(1) (2004).
- 2) The circumstances of the offense. *Id.*
- 3) The history of the defendant. *Id.*
- 4) The characteristics of the defendant. *Id.*
- 5) The seriousness of the offense. 18 U.S.C. § 3553(a)(2)(A).
- 6) Promotion of respect for the law. *Id.*
- 7) Just punishment for the offense. *Id.*; U.S. SENTENCING GUIDELINES MANUAL § 1A1.1, pt. A, ¶ 2, introductory cmt. (2007).
- 8) Deterrence to criminal conduct. 18 U.S.C. § 3553(a)(2)(B) (2004); U.S. SENTENCING GUIDELINES MANUAL § 1A1.1, pt. A, ¶ 2, introductory cmt. (2007).
- 9) Protection of the public from further crimes by the defendant. 18 U.S.C. § 3553(a)(2)(C) (2004).
- 10) To provide defendants with needed education or vocational training. *Id.* § 3553(a)(2)(D).
- 11) To provide defendants with needed medical care or other correctional treatment. *Id.*
- 12) The kinds of sentences available. *Id.* § 3553(a)(3).
- 13) Policy statements by the Sentencing Commission. *Id.* § 3553(a)(5).
- 14) The need to avoid unwarranted sentence disparities among defendants with similar records found guilty of similar conduct. *Id.* § 3553(a)(6); U.S. SENTENCING GUIDELINES MANUAL § 1A1.1, pt. A, ¶ 2, introductory cmt. (2007).
- 15) Provision of restitution. 18 U.S.C. § 3553(a)(7) (2004).
- 16) Incapacitating the offender. U.S. SENTENCING GUIDELINES MANUAL § 1A1.1, pt. A, ¶ 2, introductory cmt. (2007).
- 17) Rehabilitating the offender. *Id.*
- 18) Proportionality in sentencing for conduct of differing severity. *Id.*
- 19) Input from the Probation system, Judicial conference, DOJ, and Federal Defenders. 28 U.S.C. § 994(o) (2006).
- 20) Directions from Congress. Note following 28 U.S.C. § 994 (2006).
- 21) Maintaining sufficient flexibility to permit individualized sentences when warranted. 28

directions that they end up consistently supporting no guiding principles at all. At the very center of this governmental process which directly expresses a public morality, sentencing, we have nothing less than a kind of moral relativism, in which so many viewpoints and principles are being pursued that any one of them becomes meaningless.

The conflicts between the thirty-one policy goals of the guidelines will be familiar to any practitioner. For example, Congress's directives at once require parsimony (that a sentence be sufficient "but not greater than necessary" to fulfill the goals of deterrence, punishment, incapacitation, and rehabilitation),⁸ while at the same time requiring harsh sentences under the career offender provisions⁹ which often seem shockingly disproportionate to the offense conduct and criminal history. Similarly, the guidelines reflect Congress's instructions both to promote racial neutrality in sentencing¹⁰ and to reflect the often racially disparate sentencing practices which existed at the time the guidelines were framed.¹¹ These two examples are just a fraction of the many conflicts that become evident upon even a cursory examination of the thirty-one goals themselves.

Making the brew even more toxic is the fact that this unprincipled mass of conflicting goals was enacted with the overarching goal of producing *uniform* sentences.¹² Uniformity only makes sense if it is combined with limited and reasonable goals—otherwise, we are more likely to be uniformly *wrong* than uniformly *right* in relation to any single, reasonable policy objective. We end up with bright normative lines which are lacking any moral anchor—strong directives which mean nothing from the standpoint of public morality.

When we combine lack of principle with uniformity, sentencing becomes little more than a drunk man yelling loudly, his senses obscured while his volume

U.S.C. § 991(b)(1)(B) (2006).

22) Advancements in knowledge of human behavior. *Id.* § 991(b)(1)(C).

23) Neutrality as to race, sex, national origin, creed, and socioeconomic status of offenders. 28 U.S.C. § 994(d) (2006).

24) Fairness in sentencing. *Id.* §§ 991(b)(1)(B), 994(f).

25) Sentences need to be near the statutory maximum for crimes of violence or certain drug offenses. *Id.* § 994(h).

26) Sentences need to allow for probation for certain first offenders. *Id.* § 994(j).

27) Average sentences prior to imposition of the Guidelines. *Id.* § 994(m).

28) Effect on prison populations. *Id.* § 994(q).

29) Certainty. *Id.* §§ 991(b)(1)(B), 994(f).

30) The community view of the gravity of an offense. *Id.* § 994(c)(4).

31) The current incidence of an offense in the community and nation as a whole. *Id.* § 994(c)(7).

⁸ 18 U.S.C. § 3553(a) (2006).

⁹ U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (2008).

¹⁰ 28 U.S.C. § 994(d) (2006).

¹¹ 28 U.S.C. § 994(m) (2006).

¹² KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 104 (1998).

increases. Like that drunk man, as we shall shortly see, the guideline system is also somewhat wobbly on its feet.

B. *Unstable Guidelines*¹³

The fact that the guidelines do not stand on coherent principles is not the only structural problem they suffer. The second major structural problem relates not to the work of the legislature, but the judiciary. Judges consistently undermine the sentencing guidelines by sentencing below the range described in the guidelines manual. This is no secret—the wave pattern of this subversion is clear from the surface. Since the guidelines became advisory after the Supreme Court’s 2005 decision in *United States v. Booker*,¹⁴ about 39% of the sentences handed down were outside the applicable guideline range.¹⁵ Intriguingly, the overwhelming majority of the out-of-range sentences are below rather than above the range—95.9%.¹⁶ Even controlling for those sentences where the government recommended a downward departure for cooperation, the remaining sentences run about 9:1 in favor of sentences below the range compared to those above.¹⁷

So judges are much more inclined to go under, rather than over, the guidelines. So what? Judges are notoriously free-spirited, protected as they are with life tenure.

The answer to this “so what?” is quite important. If judges went both over and under the guidelines at about the same rate, perhaps we could rack it up to their individualistic natures. However, it *matters* that these judges so overwhelmingly go the same way, and in such large numbers. It means that they have something fascinating in common—the sense that the guidelines are wrong in a specific way, by being too harsh. That is, a broad range of judges agree that justice is not served by following guidelines that lead to lengthy sentences, particularly in certain types of cases.¹⁸ We might call this instinct “natural law” in that it seems to derive from deeply-held ideas about justice that a wide variety of federal judges share, a sense of fairness that directs a judge to reject guidelines that seem grossly disproportionate to the damage caused by a given crime.

Some might see this rejection of the guidelines by judges as flatly inconsistent with the uniformity goal of the guidelines themselves—that is, the judges are deviating from the guidelines, and this may enhance disparities from place to place. However, the breadth of these deviations reflect a kind of uniformity

¹³ This section is a synopsis of my conclusions in Osler, *supra* note 5.

¹⁴ 543 U.S. 220, 264–65 (2005).

¹⁵ U.S. SENTENCING COMM’N., *Preliminary Post-Kimbrough/Gall Data Report*, tbl. 1 (Dec. 2008), available at http://ussc.gov/USSC_Kimbrough_Gall_Report_December_08_Final.pdf.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ In drug cases, for example, judges went over the guidelines 0.6% of the time, but under the guidelines (not including government-recommended departures) a whopping 14% of the time. *Id.*

itself—a uniform rejection of the guidelines as too harsh by many sentencing judges. The guidelines, though, do not adjust to this reality. In their current form they simply do not respond or adjust to the fact that judges are subverting them.

Striking problems grow out of this phenomenon of judges consistently going under, rather than over, the guideline range. The sentencing system is fundamentally unstable when so many sentences are the result of rejection of the central structure which is supposed to be creating uniformity, but instead produces harsh sentences or subversion. So long as a plurality of judges are subverting the system, there can be no sense of certainty about the process we are using. This, of course, invites constant lurching changes at the hands of the Congress and the courts, as we saw over the last ten years as first the Feeney amendment made the guidelines stricter,¹⁹ and then the *Booker* decision made those same guidelines advisory.²⁰

The threat to the broader democratic process is more subtle. That danger arises from the fact that the subversion of the guidelines is coming from insiders—judges—and not from outsiders. In a free-speech regime, a central dynamic is the dialogue between those within political systems and the critics of that system. The civil rights marchers, for example, demanded change from those who held power in the South. This began a public dispute and dialogue between the sides which ultimately led to change through democratic channels and through the courts. The openness of the discourse, which included powerful public statements such as Martin Luther King, Jr.'s Letter from Birmingham Jail, was healthy, robust, and profoundly American.

Unfortunately, that dynamic is lost when insiders subvert a political process such as guideline sentencing. There is not the same kind of public debate because the critics—the judges—are able to take direct action on their own in individual cases. Worse, this direct action by subversive insiders may deprive outside critics of those most extreme cases which so often provide the provocative anecdotes which lead to change.

Instead of a dialectic between critical outsiders and defensive insiders, the primary corrective mechanism in federal sentencing has been quiet subversion by insiders, a process which neither reflects the mores of a free-speech democracy nor makes any effort to adjust what the guidelines require to the judges' sense of what is right. We must do better. How we might do better is the subject of the next section.

¹⁹ 149 CONG. REC. H7640-46 (daily ed. Mar. 27, 2003) (statement of Rep. Feeney) (speaking to amend the PROTECT Act). Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in various sections of Titles 18, 28, and 42 of the United States Code).

²⁰ *United States v. Booker*, 543 U.S. 220, 264-65 (2005).

III. OPTIONS TO REMEDY THE BROKEN GUIDELINES

A. *The Challenges to Reform*

If the guidelines are unprincipled, unstable, and unloved, they must be swept away or seriously reformed. To solve the problems discussed above, any new system would have to allow for discrete principles to guide individual sentences, and also must allow judges enough discretion that they are not constantly undermining and destabilizing the sentencing system.

The options for reform are limited by some very present realities, though. First, it must be recognized that an entire body of law and practice has grown up around the guideline system. The Sentencing Commission has now become the type of institutional structure which is hard to dislodge,²¹ and which has provided no small benefit to the sentencing community by collecting and disseminating data. Moreover, we now have a generation of judges, probation officers, prosecutors, and even defense attorneys who have learned their trade entirely within the guideline years. For them, the guidelines have shaped their view of sentencing by providing, at the very least, an important baseline for arguing about and establishing sentences.

Finally, the procedure in federal court assumes the presence of some kind of guidelines. Probation officers are called on by statute, for example, to produce presentence investigation reports which are intended to help judges navigate the guidelines.²² These reports truly do provide a wealth of valuable information to the sentencing judge, and it would be a real loss if they were to be pushed out of the system as part of any reforms.

Thus, an ideal system would not only address the principal problems with the guidelines, but would allow for a continuing positive role for the sentencing commission, provide some sort of baseline for sentencing, and leave in place the guidelines-focused bits of process which provide a true benefit, such as presentence investigation reports.

B. *The Primary Options*

Sentencing reform is a concept large enough to encompass everything from blowing up the system to tinkering with the details. Here, I will briefly discuss three possibilities for reform: getting rid of the guidelines, adjusting the existing guidelines to improve them, and retaining the idea of guidelines while switching from a leading-edge to a trailing-edge paradigm.

²¹ This problem was noted over a decade ago by Kate Stith and José Cabranes, who, in discussing the sentencing commission and its work, referred to the force needed to eliminate such a bureaucracy as a “Herculean endeavor.” STITH & CABRANES, *supra* note 12, at xi.

²² 18 U.S.C. § 3552 (2006).

1. Dumping the guidelines

Until 1987, federal judges were given wide leeway in sentencing. They were constrained by statutory maximums and (more rarely) minimums, but those left a very broad range of years in which to craft a sentence. Moreover, sentences could be shortened significantly through parole and good-time credits.²³

While a return to those days would certainly achieve the goal of giving judges more discretion, it would take away any baseline to the system. Without that baseline, the genuine problem of disparity in sentencing (from place to place and judge to judge) might return in force. While a return to the old system might be an improvement, it would ignore the fact that for over twenty years now participants in the system have had a baseline for discussion in the form of the guidelines. Having such a baseline can not only inhibit disparities but require substantial deliberation and explanation by courts in this most important function. Without a baseline to deviate from, the impetus to explain a deviation is eliminated, and most people would agree that the thorough discussion and explanation of a sentence is a good thing.

2. Reforming the present structure

Certainly, we could reform and simplify the existing structure and achieve many of the goals described above. At least one comprehensive attempt at this has been made. In 2006, an entire issue of the Federal Sentencing Reporter was dedicated to the Constitution Project's Model Federal Sentencing Guidelines.²⁴ There, a group of experts including Frank Bowman, Steven Chanenson, Nora Demleitner, Michael O'Hear, and Mary Price suggested very specific reforms to individual portions of the existing guidelines. For example, Frank Bowman simplified and refined the primary guideline for financial crimes, § 2B1.1.²⁵

While such a re-making of the existing guidelines are undoubtedly an improvement on what we have now, the Model Guidelines pose two problems as a central reform. First, the Model Code still does not articulate clear directive principles which inform each guideline, though (being simpler) they might give judges some more ability to articulate their own principles in sentencing. Nonetheless, the Model Code would continue the project of central control of principle, and may not have done enough towards this end before beginning the analysis of individual components of the guidelines. Moreover, because different experts (with different agendas) analyzed and crafted each section, the fracturing of principle might even have been exacerbated.

Second, while creating a simplified structure (like the Model Guidelines)

²³ STITH & CABRANES, *supra* note 12, at 29–77.

²⁴ 18 FED. SENT'G REP. ix (2006).

²⁵ Frank O. Bowman, III, *Economic Crimes: Model Sentencing Guidelines § 2B1*, 18 FED. SENT'G REP. 330 (2006).

would be an improvement on the current guidelines, if put into place it would also be subject to political meddling by Congress, which cannot seem to resist adding new and diverse priorities into numbers-based sentencing systems. Because they are comprised largely of enhancements, such guidelines (Model or not) virtually cry out to be adjusted by legislative fiat. The danger is that the Model guidelines would be a great remedy . . . for a few years, at which point complexity would return, much as we see after each wave of tax code simplification.

3. Trailing-edge guidelines

A third option would be to turn the current system upside-down. This would be accomplished by using the sentencing commission's data-collection system to provide judges with the ability to establish a baseline for a given offense based on what other judges have done in similar cases. The application of principle to a case would be returned to trial judges, and such a system would allow the court and practitioners to establish a baseline without many of the correlated problems associated with "leading-edge" guidelines. At base, trailing-edge guidelines offer a radical but realistic escape from the problems posed by a sentencing establishment which has gotten acclimated to a fatally flawed system.

IV. TRAILING-EDGE GUIDELINES AS A BEST OPTION

A. *Leading, Not Following*

As described above, our current "leading-edge" guidelines try to *lead* sentencing judges to a result without doing anything to take into account what the judges actually *do*. This system (advisory or mandatory) rests upon a central and faulty premise: That a bureaucratic commission will ever know more about sentencing than the collective wisdom of sentencing judges themselves. Because all else rests on this incorrect premise, the present system (or one structured like it) is bound to be not only resented but to be constantly subverted by sentencing judges who correctly perceive the arrogance of the project.

Reform that addresses this dynamic is possible without disposing of guidelines and the baseline they provide. This third way does not throw out the guidelines in whole, but only the idea that the guidelines be structured as directives which tell judges what to do. "Trailing-edge" guidelines would not tell judges how to act from a seemingly omniscient perspective, but rather would tell those judges what their peers have done in similar circumstances.

B. *The Trailing-Edge Process*

In a very general way, the process of sentencing under trailing-edge guidelines would look very familiar. Probation officers would continue to prepare presentence investigation reports, judges would continue to have a baseline for

sentencing, and variances from the baseline would still require an explanation. Examined more closely, however, in comparison to our current guidelines they would be simpler, more whole, and in tune with the discretion of judges.

The trailing-edge guideline system would be based on a strength of the Sentencing Commission: the gathering and analysis of data. The Commission would create a database which would take into account every sentence in every federal district. These fact sets would be merged into a database which would reflect modern technology's ability to endlessly slice and dice such information. The result would be a computer program that would allow a probation officer or judge to call up high sentence, low sentence, mean and average for any type of crime, taking into account the particular facts of the case. It could also produce data points in between the average and the high or low—for example, it could create a “cloud” of past sentences which lop off the five percent or ten percent of sentences at the high and low ends of the continuum. In fact, the visual information available instantly to the judge could even include a graph which included a dot for every sentence, displayed on a graph showing all sentences. When a judge clicks on a dot within the graph, information about that particular crime might come up, providing points of similarity or distinction with the one the court is presently considering.

In real life, then, the operation of the trailing-edge guidelines might be quite simple. Consider, for example, a bank robbery in which the defendant, Sam, was convicted at trial of taking \$12,500 from a teller that he threatened with a knife. This particular defendant has one prior conviction for selling ecstasy, for which he received a two-year sentence a decade ago.

Under the present guidelines, the calculation of a sentence under the guidelines is driven by the complex formula that the sentencing commission has decreed to apply to that particular type of crime. Thus, with Sam the Bank Robber, we start by calculating his offense level, with a base offense level of twenty points applying to robbery.²⁶ To that, we add two points, since the victim was a bank,²⁷ and then add three more points for the brandishing of a knife.²⁸ On top of that, we put in one more point because the amount taken was over \$10,000,²⁹ bringing the total offense level to twenty-six. Next, we calculate the criminal history category. With three points, Sam will be in criminal history category II.³⁰ Now that we know that the defendant is at an offense level of twenty-six and a criminal history category of II, we consult the sentencing table to find that the guideline range of imprisonment is 70–87 months. Most judges will stay within that range, despite the mass of arbitrary choices built into the guidelines that led to that narrow outcome.

²⁶ U.S. SENTENCING GUIDELINES MANUAL § 2B3.1(a) (2008).

²⁷ *Id.* § 2B3.1(b)(1).

²⁸ *Id.* § 2B3.1(b)(2)(E).

²⁹ *Id.* § 2B3.1(b)(7)(B).

³⁰ *Id.* §§ 4A1.1(a), 5A.

Now, let us consider the same case under trailing-edge guidelines. The first step will be to enter the basic facts of the case—the type of crime, the victim, the amount taken, the use of the knife, and the defendant's prior conviction. These standard elements would be the same elements now found in the sentencing guidelines, only stripped of their numerical aspects. When a judge or probation officer punches in this data,³¹ the result will be a graph which will display the highest sentence for such a crime, the lowest sentence, the national average, and every sentence given in the past few years in the form of dots on a continuum. Likely, there will be a grouping around the average. Taking this into account, the judge will determine a sentence, and explain any strong deviation³² from the norm with particularity, noting the circumstances of the case or defendant that make this sentencing unusual. A defendant would retain the ability to appeal the judge's finding of sentencing factors which were added into the mix.

This trailing-edge system would keep some of the features of the current system. The Sentencing Commission would continue to play an important role, not only in maintaining this real-time system but in considering additional factors which might need to be added (or others deleted). A guidelines manual would continue to be issued, but it would be devoid of the endless parade of numbers it now contains. Rather, for each crime category it would simply describe the factors which must be inputted as part of a guideline calculation. Probation officers would continue to produce presentence investigation reports, and there would still be a baseline to the system. As described below, this type of guideline would provide many benefits and efficiencies, while a few tough issues would still have to be resolved.

C. Trailing-Edge Benefits and Challenges

1. Benefit: A return of principle

A trailing-edge model of sentencing guidelines would allow principle back into the sentencing process the old-fashioned way—through the discretion of sentencing judges. In any given case, a judge would be freer to articulate the need for a given sentence in pursuit of a certain policy goal. Fortunately, simple policy goals are already in the relevant statute. 18 U.S.C. § 3553(a) already establishes the four traditional sentencing goals—punishment, rehabilitation, deterrence, and incapacitation—as the proper basis for a judge's decisions in combination with a parsimony provisions that directs a sentence “sufficient but not greater than necessary” to fulfill those goals. By stripping away the numerical aspects of the

³¹ One threshold choice would be whether or not to make these guidelines publicly available over the internet—there is no technical reason we could not do so.

³² The limit that would define a “strong deviation” could be within the ten percent at either extreme. Of course, all sentences would still have to be justified under the traditional sentencing goals contained in 18 U.S.C. § 3553(a) (2006).

present guidelines, a trailing-edge system would assign true meaning to these provisions for the first time in two decades, freeing judges to act as judges rather than accounting clerks and addressing the pointlessness of contemporary sentencing.

2. Benefit: A truer dialectic between judges and the guidelines

As described in part II (B), the current guidelines are unstable because they simply do not match judges' perceptions of what is just. They undermine the guidelines with variances and downward departures in a way that consistently shows they think the guidelines are too harsh. Trailing-edge guidelines would largely eliminate this problem, because the guidelines would, over time, adjust to the general and collective sense of what judges think is right, while allowing more latitude for open and honest variances from the norm. The result would be a more transparent and honest sentencing system.

3. Benefit: Uniformity is retained and enhanced as a core value

A primary, and justifiable, motivating principle for the guidelines was a desire for uniformity. Trailing-edge guidelines will preserve this focus by not only providing a baseline, but one with a persuasive component that may cause them to be quite "sticky," in the sense that judges will only reluctantly deviate far from a norm established by their peers in similar situations.

When judges deviate from the guidelines now, they do so with the knowledge that they are rejecting fairly arbitrary numbers which were pushed into a system created with little direct judicial input. With trailing-edge guidelines, though, a sentencing judge who deviates from the norm is rejecting the collective wisdom of her peers, not the arbitrary calculations of a bureaucracy in Washington. While they certainly will deviate from the baseline, the degree and frequency of those deviations will also become less over time, as the guidelines move toward a direction that judges themselves have directed. The result will be more uniformity in the system as a whole.

4. Benefit: Allows Congressional priorities without a one-way upward ratchet for sentencing

One problem with the present system is that while it is very easy to increase sentences, it is nearly impossible to lower them through the political process. Trailing-edge guidelines will remedy this, as judges themselves will be able to lower (or raise) the guidelines through their collective actions. At the same time, Congress would still have the ability to dictate those sentencing enhancement factors—use of a gun, presence of children—which would be found by courts and entered into the program which decides the guidelines in a given case. For example, if Congress decides that it wants to make the carrying of fake guns

during a crime an enhancement factor, it would direct the Sentencing Commission to make that a new factor. The weight given that factor would then be determined by judges as they issue sentences.

5. Benefit: Simplification

The complexity of the present guidelines creates a raft of problems. For example, prosecutors with expertise in the guidelines have an inherent advantage over defense attorneys who primarily practice in state court. Two of the more complex parts of the sentencing guidelines would be particularly affected by this change—the calculation of multiple counts, and enhancements for career offenders.

Presently, it requires a complex set of calculations to merge multiple counts into a single offense level. First, you put the counts into groups, calculate a combined offense score, convert these offense scores into the number of “units” each group receives, add those, and then re-calculate the offense level.³³ Whew! In teaching federal sentencing, I often observe that this is the part of the system students find the most confusing. Under trailing-edge guidelines, however, the multiple count calculation will be done by the graphing program—it will display sentences only for similar multiple-offense convictions.

Similarly, the present “career offender” provisions are both laborious to calculate and arbitrary.³⁴ Under trailing-edge sentencing, the complex formula which creates enhancements for some offenders, but not others,³⁵ would be replaced by the judges’ view of how seriously to take these multiple violators. If Congress chose to continue to promote stiffer sentences for such offenders, it could designate “career offender” as one of the data inputs for the new system, which would likely lead to higher sentences for those defendants (though probably not as high as they are now).

6. Benefit: Efficiency of appeals

While trailing-edge guidelines would still allow defendants to appeal the finding of an enhancement factor, they would probably lead to many fewer appeals. First, some of the mechanizations of the current guidelines which create the most problems (i.e., career offender status) would probably be mitigated by judges once those provisions were stripped of their numerical values. Further, a broader zone of presumptively reasonable discretion by sentencing judges would be created, which in time would cut down on the number of appeals. Finally,

³³ U.S. SENTENCING GUIDELINES MANUAL § 3D1.1 (2008).

³⁴ *Id.* § 4B1.1.

³⁵ *Id.* For example, a defendant who has been convicted of selling marijuana three times might be categorized as a career offender, while someone who committed three major frauds (or two murders) leading to conviction would not.

simply by having a simpler system which is more transparent, we should end up with fewer appealable issues, particularly those relating to misunderstandings of the system by judges or defense attorneys.

7. Challenge: What to do with relevant conduct

One troubling issue that trailing-edge guidelines would not directly address would be the role of relevant conduct in the present system.³⁶ Under that system, judges may sentence defendants not only based on what they were convicted of, but to other related offenses (even those for which the defendant was acquitted) which the judge finds occurred by a preponderance of the evidence.³⁷

It could be that in combination with a transition to a trailing-edge guideline system, we choose to switch to a sentencing system which recognizes only convicted offenses in creating the graph-based guidelines. However, in sentencing under those guidelines, judges would be free to consider relevant conduct in deciding how much to deviate from the guidelines themselves. This would at once reflect the historic role of relevant conduct from pre-guideline days and allow relevant conduct to play a role in sentencing wholly within the discretion of the court.

8. Challenge: The role of Congress

Though trailing-edge guidelines would allow for a continuing role for Congress in setting the sentencing agenda, they would also require that a raft of statutes and Congressional priorities be swept away. As discussed in part II (A), though, those Congressional priorities are too numerous and conflicting to be of value now, so sweeping them away to start over will not make much difference.

Certainly, Congress is loath to give up its power, but it could be that this is a Congress which is open to a new sentencing paradigm and is willing to recognize that the current system is not only fatally flawed, arbitrary, and unproductive, but extraordinarily expensive in terms of the prison population it produces. We should give Congress credit for changing when it has erred, a process we have seen repeated over and over in American history.

V. CONCLUSION

In the end, a trailing-edge sentencing system would shift discretion back to judges, maintain uniformity, simplify the system, and still require accountability by the courts. One problem with our currently guideline system is that it is so complex and unwieldy that while it requires a great deal of math and category-creation, it never really asks for what it wants from judges. The massively

³⁶ *Id.* § 1B1.3.

³⁷ *Id.*

complex structure of the guidelines have swallowed up and obscured the most basic function of any set of sentencing guidelines—making sentencing rational. In contrast, a trailing-edge system asks directly for what is only sought by implication under the guidelines: an explanation from the judge for why she might be out of step with her colleagues in sentencing a given type of case. If sentencing is to gain a sense of principle and stability, we must stop leading judges by the nose and allow their wisdom to shape the system which rests on their shoulders.

